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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 936

R. A. BEAVER ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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OCTOBER TERM 1965

R. A. BEAVER ET AL.,
Petitioners

v.

UNITED STATES,
Respondent.

No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 350 F. 2d 4 and is reprinted in Appendix A hereto. The two opinions of the District Court affirmed by the opinion of the Court of Appeals, the first as to its jurisdiction and the second as to petitioners' rights to compensation for the taking, are reprinted in Appendices B and C hereto respectively. The District Court's final decree in condemnation sought to be reviewed is reprinted in Appendix D hereto.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 24, 1965. On November 19, 1965, Mr. Justice Douglas signed an order extending the time for filing the petition for a writ of certiorari to and including January 21, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

(1) The principal question presented is whether the United States should be awarded and allowed to take, without compensation, land privately held under patented title from 1914 to the date of the taking (and as well the known improvements thereto made by the record title owners), claiming by a movement of the River in the area (allegedly accretive) more than thirty years before the first mention of the claim, notwithstanding the requirements of the Fifth Amendment and (i) the equities of the situation (as expressed by the District Court, the "many equities in defendants' favor") and (ii) the requirements and expressed policy of the Color of Title Act. With respect to that principal question, the particular legal issues, in the terms of the opinion of the court below, are:

(a) Whether the doctrine of equitable estoppel, which the court below said "undoubtedly would apply" to bar the claim if made by a private individual, is inapplicable because the claimant is the United States; and

(b) Whether the Color of Title Act and the Congressional policy expressed therein may be disregarded because (i) from 1940-1942 the land was possessed by the State of Arizona, which acquired it on account of a tax delinquency and presumably did not physically occupy the land during that period, or (ii) the United

States had issued in 1929, purportedly under the Reclamation Act of 1902, an order of withdrawal from entry pertaining to the government land to which petitioners' land allegedly "accreted".

(2) If the principal question stated be determined against petitioners, a second question is presented as to whether the "doctrine of accretion" should be abated or limited in the circumstances presented where:

(i) the only substantial evidence in the record shows that the course of events after 1910, eventually resulting in the alleged "accretive" movements relied upon by the United States, was the effect, at least in part, of the construction and operation of Laguna Dam by the United States;

(ii) the claimant has, by controlling its flow, prevented any "natural" operation of the River since about 1935;

(iii) substantial authority conflicting with the cases relied upon by the United States and the decision of the court below would deny the claim here made in any case in order to preserve rather than destroy titles;

(iv) the only substantial evidence in the record shows a shift in the River in 1912 which at least under modern definitions, based on present-day engineering knowledge, would be categorized as an avulsive rather than an accretive movement.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to, and Article Four, Section Three, Clause Two of, the Constitution of the United States; "the Color of Title Act," 45 Stat. 1069,

as amended, 43 U. S. C. Section 1068; and "the Reclamation Act of 1902," 32 Stat. 388, 43 U. S. C. Section 416.

STATEMENT OF THE CASE

This case arose as a condemnation action by the United States under 28 U. S. C. § 1358 in which the government contended, and the lower courts ruled, that the holders of record title, by derivation from a patent issued in 1914, were not entitled to any compensation, either for the land or the land improvements made by them, because of movements of the Colorado River in the area between 1909 and 1930 which were alleged to have erased the record title and to cause the land in question to be accreted to land still owned or repurchased by the United States in Section 4, San Bernardino Meridian, in California.

The principal facts of the case are as follows:

The land involved was originally surveyed as within Arizona, Section 20, Gila and Salt River Meridian, and was conveyed by the United States by patent in 1914. From that time on the land was taxed by the State of Arizona and by Yuma County, Arizona, and Arizona exercised jurisdiction and dominion in respect of the land. Indeed, in 1940, the parcel was taken by the State of Arizona on account of non-payment of taxes and was conveyed by the State of Arizona in 1942 to one of petitioners' predecessors in interest.*

*California never exercised any jurisdiction in respect of the land (although California school districts delineated their boundaries as the center line of the channel of the Colorado River, with a notation that the boundaries "Should be Changed at time the State Line between California and Arizona is established by law"). However, the District Court rejected appellants' argument as to prescription and acquiescence, stating particularly that "No evidence was introduced indicating there was any knowledge on the part of any California official that Arizona had ever taxed the property in question or that it claimed jurisdiction over the parcel."

Appellants leased the condemned land in 1955 and purchased it in 1959. The land was improved by them at considerable expense. There is no question that, as the District Court second opinion stated,

> "The evidence here shows that the defendants Beaver and their predecessors were bona fide purchasers of the property in question, with no knowledge of the Government's claim. Also, since about 1955, the Government agents in the reclamation service probably observed this riparian land being put to agricultural use."

The first time when the government made any claim to the land or in any way suggested the existence of such a claim was shortly prior to filing of the action in 1960; prior to that time, its own published documents and actions affirmed the status of the title as it appeared of record.

The claim of the United States rests on claimed accretive movements of the River in the area between about 1909 and 1930. The District Court upheld the government's contentions even as to the development of a radical new River configuration in 1912-1914, which, even as described by the government's expert "witness," would seem more accurately categorized as an avulsive shift.*

In any event, there is no doubt that by 1930 the River had moved southward more than a mile and the condemned land appeared on the opposite (north) side of the River.

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*Between 1902 and 1909 the River involved in the area was stable and there were only minor changes in its location. In 1909, Laguna Dam, located about 45 miles downstream, was closed. Thereafter, it is plain from the maps available that the River overflowed its banks in the floods of 1912 and 1914 and developed a new bend four to five thousand feet north—away from the condemned land. The configuration of that bend became the permanent configuration of the River, as attested to by all available subsequent maps from 1915 to 1930.

It was conceded in the District Court second opinion that the operation of Laguna Dam after 1909 caused changes in the River which contributed to the subsequent events as to the River's course; indeed, as the opinion notes, not only did petitioners' independent experts so testify, a pre-litigation report by the government's "witness" in 1959 supported that position. However, the District Court found that Laguna Dam was not "more than a minor factor in causing the erosion and accretion at the site of the parcel" (failing to comment as to its influence on the 1912-1914 jump) and the Court of Appeals accepted that finding. Moreover, it is indisputable that since closure of the Hoover Dam in 1935 the River has in effect been a controlled stream and, in result, there has not been, and there is no longer any opportunity for the channel of the River to shift except by man-made cut-offs or the like.

With respect to petitioners' major arguments based on the record in favor of compensation due them under the Fifth Amendment, the rulings of the courts below were as follows:

1. *Equitable Estoppel.* The District Court stated that:

> ". . . there are many equities in defendants' favor. It would have been to the credit of the Government to have attempted to reach an equitable settlement with defendants. However, the Government having failed to do so, defendants' redress is not in the courts but with Congress."

The Circuit Court said that:

> "Were this a dispute between two private individuals, the doctrine of equitable estoppel would undoubtedly apply."

However, the Court said, if the land involved was accreted to other government land, it was beyond the pale of equity

and within the exclusive province of Congress under Art. IV, Sec. 3, Cl. 2 of the Constitution.

2. *The Color of Title Act.* The Color of Title Act was held to be inapplicable because (a) there was no showing that, during the period when the State of Arizona claimed the property for taxes from 1940 to 1942, the State was in actual, physical possession of the land (which the Circuit Court took to be a finding that the State of Arizona "never took possession of the parcel"), leaving appellants just short of the 20-year period referred to in the Act counting from 1942 to the date when the action was filed and ignoring all other years; and (b) a general order of withdrawal in 1929, purportedly under the Reclamation Act of 1902 for the purpose of constructing irrigation works (which never were built on the withdrawn land)—although specifically "excepting any tract, the title to which has passed out of the United States"—referred to the California fractional Township to which the condemned land allegedly accreted.

3. *Equitable Abatement or Limitation of the Doctrine of Accretion.* Inherent in the facts of the case are a number of special factors which call for abatement, or at least reconsideration of the impact, of the doctrine of accretion in the circumstances presented—at least sufficiently to permit the record title owners to be compensated for their investment in improvements on the land prior to assertion of the government's claim. Apart from other factors specifically emphasized in petitioners' arguments below, attention was invited to the logic and rationale of the "doctrine of re-emergence" which had been applied in a number of cases to defeat inequitable accretion claims where, as in the western part of the United States, the land involved was precisely ascertainable as dry land by exact survey description. The Court of Appeals dismissed the doctrine of re-emergence as

resting "upon 'easy indentification' of riparian land 'lost' and 'found' again by re-emergence from the stream bed" and found those elements not present in this case—although, as the Court indicated in another part of its opinion, the land is indisputably identifiable as exactly in the same location as the land patented in 1914 and held as of record by petitioners and their predecessors in interest.

It also reserves special note that there was submitted to the Court of Appeals an amicus curiae brief on behalf of seven leading title companies in Arizona, California and Nevada pointing out that the decision in favor of the government placed in doubt title to thousands of acres of land in the three States mentioned, the federal government possessing the incidence of ownership of approximately 72.2% of all the land on the California side of the Colorado River and 76.29% of all the land on the Arizona side of the River (in each case measuring a strip one mile in width on either side of the Arizona-California Compact proposed boundary). The brief stressed that an official map published by the United States in January, 1958 showed the condemned land as privately owned and that the result of the decision below was "to raise specters of invalidity as to titles long thought secure." The "insidious aspect of the matter," it was pointed out, was that the claims which the government might assert, as in this case, were of ancient origin, as to which no private litigant could find the evidence with which to defend an assault upon his right. (Indeed, it was specially noted by petitioners that there was not any satisfactory evidence as to the events of 1910-1930 in the area involved in this case, where few people lived, and that in the main the government's case necessarily was constructed from speculative interpretation of a few intermittent maps.) Based on the foregoing, the amicus curiae brief submitted, with supporting detail, that "It is difficult to conceive a more

appropriate [case for] application of the defense of equitable estoppel" and that the decision below frustrates the intent of Congress manifest in the Color of Title Act. The Court of Appeals dismissed the argument of amicus curiae without consideration of its merit.

REASONS FOR GRANTING THE WRIT

The result of the decision below in this case, with reference to both its own idiocrasy and its extrinsic effect, is shocking.

With respect to the immediate parties, a court of the United States has made an award of property, at the behest of the government effecting a taking of long-established and acknowledged ownership rights, without a cent of compensation. In terms of the public interest, an irremovable, debilitating cloud has been impressed on much, if not all, private property ownership in a wide area surrounding the lower Colorado River and wherever else the government has owned land in a river area.

To effect that result, the prohibition of the Fifth Amendment against taking of property without just compensation and "[t]he political ethics reflected in the Fifth Amendment reject[ing] confiscation as a measure of justice" [*United States* v. *Cors,* 337 U. S. 325, 332 (1949)] has had to be ignored; all traditional concepts of equity have had to be discarded; and the Color of Title Act has had to be emasculated.

In terms of legal effect, it is necessary, and consistent with the highest duty of this Court, to correct the grievous injustice done in order to restore the dignity of the Fifth Amendment, to repair the conscience of equity and to redeem a significant Congressional policy. In terms of broader effect, it is vital that the Court should consider this case in

order to cure at the earliest possible time the serious economic disturbance and social malady threatened by the decision below.

Argument

1. *Equitable Estoppel.* The logic of the opinion below in denying application of the rules of equity to the government's claim is self-revealing of its deficiency as a "bootstrap" argument, missing the point of the case. The question presented is whether the government should be allowed to take the land it seeks without compensation. In support of its claim the government has in effect requested the Court, as a court of equity, to nullify the long-established record title of petitioners and quiet title in the government because of an alleged accretion which occurred more than 30 years prior to assertion of the government's claim. Thus, the government is a suitor which seeks the aid of the court to provide to it something which it does not have and could not obtain without a decree of the court. (Indeed, it is interesting to note that in prior years the government paid for land it acquired in the immediate area in question.) To assume at the outset, then, that the government is the established owner of the land, contrary to all appearances, just as if it had some indicia of title prior to institution of the proceeding, is to assume an answer to the question posed, denying all reality.

Moreover, it gives no effect at all to the fact that the improvements placed on the land by the record title holder could thus be claimed by the United States whenever it chose to do so, no matter in what bad faith and with whatever dire consequences for the owner, as a windfall. *Cf.* the many cases holding that parties in actual possession of condemned land may be entitled to compensation even where their title is not perfected. *Spokane Falls & N. Ry. Co.* v.

Ziegler, 167 U. S. 65 (1897); *Washington & Idaho R. Co.* v. *Osborne,* 160 U. S. 103 (1895); see 2 NICHOLS, EMINENT DOMAIN § 5.2[1], p. 13 (3rd ed. 1963). See also *Brooklyn Eastern Dist. Terminal* v. *City of New York,* 139 F. 2d 1007 (2d Cir. 1944); *United States* v. *53¼ Acres of Land,* 139 F. 2d 244 (2d Cir. 1943).

That bizarre result, the opinion below holds, is compelled by Article IV, Section 3, Clause 2 of the Constitution and by decisions of this Court, particularly the decisions of *United States* v. *State of California,* 332 U. S. 19 (1947) and *Utah Power & Light Co.* v. *United States,* 243 U. S. 389 (1917).

The words of the Constitutional provision cited contain no such negative restriction on the traditional powers of the courts—not even, it is submitted, by implication. *Cf. Moser* v. *United States,* 341 U. S. 41 (1951). Indeed, unless the Court is to adopt the extreme position that equitable principles such as estoppel can never be invoked against the United States at least in land cases—which is what the government is required in this case to effect to argue—the Constitutional provision cited seems irrelevant. A host of cases, including those cited below, has long since established that the government is subject to equitable principles and may by judicial decree be deemed estopped even where in effect a disposition of public land is thereby effected.

In contrast, a careful reading of the decisions cited by the Court of Appeals indicates their inapplicability in the circumstances here presented. In stretching those decisions to hold them controlling here, the decision below is in conflict with the persuasive decisions of other federal courts [see, *e.g., United States* v. *Certain Parcels of Land,* 131 F. Supp. 65 (S. D. Cal. 1955); *State of Iowa* v. *Carr,* 191 Fed. 257 (8th Cir. 1911); *State of Michigan* v. *Jackson L. & S. R. Co.,* 69 Fed. 116 (6th Cir. 1895)] and contrary to

the effect of numerous other decisions, of this and other courts, the persuasive logic of which cannot be distinguished [see, *e.g., United States* v. *Stinson,* 197 U. S. 200 (1905); *Carr* v. *United States,* 98 U. S. (8 Otto) 433 (1879); (*Branson* v. *Wirth,* 84 U. S. (17 Wall.) 32, 42 (1873); *Fletcher* v. *Peck,* 10 U. S. (6 Cranch.) 87 (1810); *Branch Banking and Trust Co.* v. *United States,* 98 F. Supp. 757, 120 Ct. Cl. 72 (1951), *cert. denied,* 342 U. S. 893 (1951); *United States* v. *Big Bend Transit Co.,* 42 F. Supp. 459 (E. D. Wash. 1951)]. See also the recent opinion of the Court of Claims in *Tektronix Inc.* v. *United States,* 351 F. 2d 630 (1965), and the public land cases cited therein, *Buford* v. *Houtz,* 133 U. S. 320 (1890) and *Light* v. *United States,* 220 U. S. 523 (1911). Illustratively for the purpose of this petition, the statement of guiding principle which should be—and needs to be—reaffirmed by this Court is that of the Sixth Circuit in *United States* v. *Chandler-Dunbar Water Power Co.,* 152 Fed. 25, 40-41 (6th Cir. 1907):

> "Following the ancient common-law maxim, 'nullum tempus occurrit regi', it has been settled as a rule here that the United States is not affected in respect to its pursuit of remedies by mere delay or general statutes of limitation. But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens

wrongs which it would promptly condemn if practiced by one of them upon another."

2. *The Color of Title Act.* Similarly, the constrictive construction by the court below of the Color of Title Act is unwarranted and violates the motivating force of the Act and the traditional concepts of equity incorporated therein.

There is no reason whatever in the circumstances of this case to disregard the period of time (1940 to 1942) when the State of Arizona was the record owner of the land or in any case the years prior to 1940 when the land was owned by others in the chain of title since it was, and is, apparent beyond cavil that at all times the land was held, in the words of the statute, "in good faith and in peaceful adverse possession by a claimant, his ancestors or grantors, under claim of color of title." *Cf. United States* v. *Fullard-Leo,* 331 U. S. 256 (1947); *Fletcher* v. *Fuller,* 120 U. S. 534 (1887); *United States* v. *Chaves,* 159 U. S. 452 (1895)—important decisions which should be, and which require the decision of this Court to be, referred to in interpreting the Act. (None of the decisions cited by the Court of Appeals in support of its view as to the State's adverse holding appear to be in point.) To hold in effect that the State was required to post a guard on the property to prove its claim, which all at the time acknowledged, is, indeed, contrary to what this Court said in a not dissimilar context in the *Fullard-Leo* case. Moreover, it is noteworthy that actual possession by the original patentee, a homesteader, is demonstrated by the issuance of the patent and that, accordingly, contrary to the assumption made by the courts below, an assumption of continued possession would be more appropriate [see *Lazarus* v. *Phelps,* 156 U. S. 202, 205 (1895)].

Nor is there any reason to deny effect to the Color of Title Act in this case because some land owned by the

government in 1929 was withdrawn from entry purportedly for the construction of irrigation works thereon under the Reclamation Act of 1902. The order of withdrawal in accordance with its own terms excepted any tract title to which "has passed out of the United States" so that it was not applicable to the land here condemned, to which at the time the government did not have a claim even by its own allegations. In any event, it is a gross *non sequitur* that the issuance of a general withdrawal order in 1929, with never any apparent application to the land here in question, could alter the obvious applicability of the Act to petitioner's good faith claim of color of title (his being the only claim of title prior to filing of this suit). Moreover, it is not amiss to note that the 1929 withdrawal was purportedly issued under Section 3 of the Reclamation Act of 1902, 43 U. S. C. § 416, authorizing such withdrawal only for "irrigation works" under the Act. The land thus withdrawn in the general area, it would appear, was not, and indeed has never been, thus used. Accordingly, the land in any event should have been long before 1960 restored to public entry by virtue of the explicit mandate of the statute cited directing that the Secretary "shall restore to public entry any of the land so withdrawn when, in his judgment, such lands are not required for the purposes [irrigation works] of such sections." The fact is that the government has withdrawn from any entry under the public land laws (although probably improperly under the statute cited) thousands upon thousands of acres—most if not all of the land it owns in the area. Thus, if the opinion below is allowed to stand, the Color of Title Act will in effect be negated as a statute of repose and replaced by a judicially approved perennial cloud of doubt and disorder.

Overall, the compelling consideration here presented is that the legislative purpose of the Color of Title Act appears to have been overriden and defeated by the devising of

pointless patent artificialities. See particularly S. Rep. No. 588, U. S. Code Cong. & Ad. News, 83rd Cong., 1st Sess., p. 2014 (1953); H. R. Rep. No. 497, *Ibid* at 2015. Particularly in light of the effect of such a construction of the statute on many other cases, it seems imperative that this Court at least considers the question here presented so as to remove improper obstructions to, and assure, fulfillment of the remedial objectives of the Act.

3. *Equitable Abatement or Limitation of the Doctrine of Accretion.* The doctrine of accretion has a long history in Anglo-American jurisprudence. Nevertheless, there is good reason to doubt whether it should be applied in all its harshness in circumstances like those here presented. The advantages which accrued to a riparian owner in England, of course, are not at all in point in the Western United States: Water rights are established wholly independent of riparian ownership [see, *e.g.,* Arizona Constitution, Article XVII, Section 1], as is ownership of navigable stream beds [see, *e.g., Pollard* v. *Hagan,* 43 U. S. (3 How.) 212 (1845)].*

The doctrine of re-emergence represents one fundamental qualification of the doctrine of accretion reflecting the modern concern of courts with the preservation of title as a chief desideratum. [See, e.g., *Herron* v. *Choctaw &*

*The usual justifications put forward for the doctrine of accretion are: (i) the maxim *de minimis non curat lex* originally attributed to Blackstone and restated in *Adams* v. *Frothingham,* 3 Mass. 352 (1807); (ii) the notion that every riparian owner, being subject to loss by the action of waters, should be entitled to any correlative gain [*New Orleans* v. *United States,* 35 U. S. (10 Pet.) 662, 717 (1836)]; (iii) that community interest requires all land to have an owner and it is most convenient that insensible additions to the shore should follow title to the shore itself [*Banks* v. *Ogden, 69* U. S. (2 Wall.) 57 (1865)]; and (iv) the doctrine of accretion preserves the riparian owner's right of access to the waters [*City of St. Louis* v. *Rutz,* 138 U. S. 226 (1891)].

Chickasaw Nations, 228 F. 2d 830 (10th Cir. 1956); *Hunzicker* v. *Kleeden,* 161 Okla. 102, 17 P. 2d 384 (1932); *Baumhart* v. *McClure,* 21 Ohio App. 390, 153 N. E. 211 (1926); *Ericson* v. *Horlik,* 48 S. D. 544, 205 N. W. 613 (1924) and the leading case of *Allard* v. *Curran,* 41 S. D. 73, 168 N. W. 761 (1918); *Hughes* v. *Birney's Heirs,* 32 So. 30 (La. 1902)]. As has been well stated in 3 Farnham, WATERS AND WATER RIGHTS 495 (1904):

> "[T]he fiction should give way to the fact, and the owner should not lose title to his property. The title to land itself is of more importance than the riparian right of access to the water or the convenience of having a natural, rather than a methematical boundary, and rules which were made for convenience should not be permitted to wrest the title to land from its true owner."

Contrary to the government's analysis of some of the reemergence cases, adopted by the courts below, they are not all easily distinguishable. See, *e.g., Hughes* v. *Birney's Heirs, supra,* and *Mulry* v. *Norton,* 100 N. Y. 426, 63 N. E. 581 (1885). More importantly, the principle they enuciate and the implications thereof have instructive force in this case.

Similarly, the rule that "In general, a riparian owner cannot claim title to land added by accretion or formed by reliction as a result of creating by himself an artificial condition causing the accretion or reliction" [Annotation, 134 A. L. R. 467, 472 (1941)] is an equitable modification of the doctrine of accretion which reserves special consideration in light of the facts of this case. Apart from the specific inducing effect of Laguna Dam, the control of the River by the government since 1935 is not to be overlooked. By virtue of that circumstance, the major justifica-

tion of the doctrine of accretion that every riparian owner, being subject to loss by the actions of waters, should be entitled to any correlative gain [*New Orleans* v. *United States,* 35 U. S. (10 Pet. 662, 717 (1836)] is defeated. In result, the United States, as the largest landowner in the area, can lay claim to enormous gains and (apart from the special protection of sovereign immunity available only to the United States) other riparian landowners have been deprived of any opportunity to regain their land. It hardly seems a sufficient answer that that result was not achieved by an evil design when the United States in fact seeks to take what cannot be termed other than unfair advantage of the situation so many years after the operative facts have been lost or buried.

Overall, the doctrine of accretion can no longer be viewed as an arcane subject of only historical interest. As a sword with a broad cutting edge it is currently being wielded by the United States in a wide swath. It should now, then, be reconsidered and refined by this Court in the light of modern conditions and concepts of equity.

4. *The Economic and Social Impact of the Case.* Immediately following the announcement of the decision of the Court of Appeals, the United States proceeded to file several actions in the District Courts in California and Arizona based on hoary accretion claims similar to that here asserted, seeking not only the ejectment of the record title holders but as well trespass damages for their many years of occupancy under color of their titles. It is apparent that, as the largest owner of land in the area and in reliance on the opinions below, the United States has embarked on a program of large-scale aggrandizement utilizing its superior resources to full advantage. It would appear, then, that only this Court can put a stop to or even brake that ruinous course.

Apart from specific actions, the decision below necessarily impairs all private property titles in a wide area. If the decision is allowed to stand, presumably the government can claim any land it chooses at any future time and cast upon the landowner the burden of disproving accretion with whatever resources he can then muster to fight the battalions of the government.* Since the land may be accreted to "withdrawn" land (by legal or illegal withdrawals), even the Color of Title Act may not be available as a defense—and that, in any event, is at best an expensive remedy, requiring substantial payments to the United States if the land is to be retained. Because of the control of the River today (and since 1935), there is no way for landowners to recover what they may have lost a half a century ago. What is worse, because of the doctrine of sovereign immunity, there is no way for the landowners to clear their title short of obtaining special Acts of Congress in their favor (the kind of special appeals which the Color of Title Act was designed to avoid). In short, the decision below amounts to the investiture of a type of feudalistic servitude on all private land ownership in a wide area, the apodictic consequences of which include at least the stunting of eco-

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*The ruling of the District Court below directing Petitioner, defendant below to proceed first with their proof on the "accretion" issue is reminiscent of the preliminary judgment in the Anglo-Saxon courts where the court awarded the privilege of proof (or trial by battle or ordeal as an award of favor (in this case disfavor to one side or the other in a contested matter. See e.g., 2 Pollack and Maitland, HISTORY OF ENGLISH LAW 602-610 (2d ed. 1952); Thayer, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 354 (1898); Knappen, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 60 (1942). It is deserving of note that the conduct of the trial by the District Court at various stages (for example, circumscribing the mode of cross-examination of the government's engineer-advocate expert "witness") constituted favor to the government which contributed materially to the result in the case—particularly because of the inherent difficulty of ascertaining let alone proving by impartial witnesses or satisfactory other proof evidence of 30 to 50 years before in an area where few people lived.

nomic and social growth in the area. Only the granting of this writ of certiorari and the rendering of a decision by this Court in this case can cure that unfortunate harvest of the decision below.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

January 21, 1966.

.....

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. A. BEAVER, ET AL., *Appellants,* *vs.* UNITED STATES OF AMERICA, *Appellee.*	No. 19,312

[August 24, 1965]

Appeal from the United States District Court
for the Southern District of California
Southern Division

Before: BARNES, JERTBERG and MERRILL, Circuit Judges BARNES, Circuit Judge:

We extract from appellee's brief what we deem to be a fair statement of the facts and the parties' respective contentions:

> "On October 10, 1960, the United States filed this condemnation proceeding to take 11.8 acres of land in Imperial County, California, for use in the Colorado River Front Work and Levee System Project. The United States was of the opinion that it already owned the 11.8 acres (hereafter, the tract) but because appellants claimed an adverse interest

this action was instituted to condemn that interest, if any, and to determine any compensation to be paid appellants. The court held two non-jury trials, the first to determine the validity of appellants' contention that the court lacked jurisdiction because the tract was located in Arizona and, the court having found that the tract was in California, the second to determine the validity of appellants' claim of title and right to compensation. The court ruled that the United States had at all times possessed full fee simple title to the tract and that appellants had no claim of title or [right] to compensation. After final judgment in favor of the United States, this timely appeal was taken.

"A brief statement of the physical situation will aid in understanding the various contentions. The Colorado River (hereafter, the river), the boundary between Arizona and California, runs generally east to west along the southern boundary of the tract in question; the tract thus is presumably located on the California side of the River. We say presumably because decision of the jurisdictional question—whether the land is in California or Arizona—likewise decides the basic title question. The tract is bordered on the California side by a section of land officially described as Section 4, Township 9 South, Range 22 East, San Bernardino Meridian, in what is now Imperial County, California. Section 4 has been owned by the United States since the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848), and has been withdrawn from public entry since 1929. The tract in question is in the same physical location as land patented to appellants' predecessor in title in

1914, and, at that time, located in Arizona. Prior to 1902, the river in this area flowed in a channel located several thousand feet north of its present location and along the southern boundary of Section 4. Between 1902 and 1942 the river channel moved in a southerly direction until it established the channel approximately in its present location.

"It is the contention of the United States that the river channel arrived at its present location by a slow accretive movement, eroding the southern (Arizona) bank of the channel and depositing soil on the northern (California) bank. In this manner the land claimed by appellants was washed away and the tract in question was added by accretion to Section 4, owned by the United States; under well-settled principles the tract thus belongs to the United States. Appellants, on the other hand, contend that the river arrived in its present location by several avulsive movements and for this reason the state boundary and the property line boundaries in the area were permanently fixed at the site of the 1902-1912 channel. Therefore, appellants say, the tract is still located in Arizona and appellants' land was not lost by erosion." (Appellee's Br. pp. 3-5. Transcript references omitted.)

In summary, the district court held that the property in dispute had been created on the California side of the river by the gradual process of erosion and accretion. (R. 275-81.) On the basis of this finding, the court concluded that jurisdiction properly lay in the United States District Court for the Southern District of California. The

court rejected appellants' theory that Arizona had annexed the tract by prescription (R. 281-83).

At a subsequent trial of the remaining issues, the district court found the land in question had accreted to government-owned land in California, and its title had thus been acquired by the United States Government. The court also rejected appellants' arguments (1) that they hold a vested interest under the Color of Title Act, 43 U. S. C. § 1068 (R. 404-05); (2) that the doctrine of re-emergence should be applied (R. 405); (3) that the United States cannot claim the tract because it induced the accretion process; and (4) that the United States is estopped from asserting title to land which appellants had improved. Final judgment was entered denying compensation to appellants and this appeal followed. We are asked to reconsider these four theories of recovery which the district court rejected.

Estoppel.

From 1914, when the United States first issued its patent to the land, until 1940, this land was ostensibly privately owned, taxable land. In 1940, as a result of unpaid taxes, the land was "taken" by taxing authorities of the State of Arizona, and the County of Yuma. The land was subsequently sold to a private party in 1942 and was maintained in private hands until late 1960.

The Colorado River which abutted this land altered its course during the relevant years and "shifted" the disputed parcel, not as one would expect, from east to west, but from south to north, *i.e.*, the river's new channel shifted from north of the subject parcel to the south. Precisely when this "shift" took place is one of the matters in dispute.

Appendix A

Appellants complain that eyewitness testimony to the character of the river's change was almost nonexistent, and, as a result, the parties and the trier of fact below were required to rely on old maps, aerial photographs and "theoretical reconstructions by hydrologists or engineers." Such a complaint, of course, is only incidentally relevant to appellants' claim of estoppel; once there exists substantial and valid evidence to enable the trier of fact to conclude that an accretion has taken place the issue cannot here be raised, unless that conclusion is clearly erroneous. For example, Exhibit 10 depicts the river as south of the subject land as of 1930. That evidence alone, we assume, would be sufficient upon which to base a finding of fact.

Were this a dispute between two private individuals, the doctrine of equitable estoppel would undoubtedly apply. But it is not such a dispute. Does the same doctrine apply to the government when it becomes a plaintiff in a condemnation proceeding? The government, of course, says it does not; the plaintiffs urge that it does.

Appellants rely primarily upon *United States* v. *Certain Parcels of Land,* 131 F. Supp. 65 (S. D. Cal. 1955); *Iowa* v. *Carr,* 191 Fed. 257 (8th Cir. 1911); *Michigan* v. *Jackson L. & S. R. R.,* 69 Fed. 116 (6th Cir. 1895).

We assume for the purposes of this case that (1) ordinarily the doctrine of equitable estoppel does not apply against the United States, particularly in those cases where it has not consented to be sued; (2) the general rule can be and has been recognized to be inapplicable, particularly where the United States has consented to be sued, or has instituted the litigation.

With the assumptions of the law in mind, we next consider the government's position that here involved is ac-

creted land, to which a special rule applies—*i.e.*, that such land can be disposed of only by Congress under Art. IV, Sec. 3, Cl. 2 of the Constitution.[1] And see *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 330, 335-36 (1936) (electric energy), and *Alabama* v. *Texas*, 347 U. S. 272 (1954) (submerged lands).

We will consider later whether the land here involved is governed by the doctrine of accretion, avulsion, or re-emergence. We assume here it is accreted land. If accreted land, it is *not* the land originally patented by the United States in 1914. If it is not the original land but rather is accreted land (accreted to land to which the title rests in the United States), then it also is land owned by the United States, whose title can be divested only by Act of Congress.

" 'The power over the public land thus entrusted to Congress is without limitations "and it is not for the courts to say how that trust shall be administered. That is for Congress to determine." ' " *Alabama* v. *Texas, supra* at 273, quoting from *United States* v. *San Francisco*, 310 U. S. 16, 29-30 (1940).

This title, says the government, cannot be lost—by mistake, *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 31 (1917) (dealing with meander lines); or by unauthorized actions, *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408-09 (1917). "[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

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[1] "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

Id. at 409. Nor can title be lost by acquiescence of employees of the executive branch of the government. *United States* v. *California,* 332 U.S. 19, 39-40 (1947). As a general rule laches or neglect of duty on the part of officers of the government (such as an implied acquiescence to the improvement of lands) is no defense to a suit to enforce a public right or protect a public interest. *Utah Power & Light Co.* v. *United States, supra* at 409.

We think apt the Supreme Court's language in the *Utah Power & Light Co.* case, *supra,* where it stated (p. 409):

> "[I]f it be assumed that the [general] rule [that the government cannot be estopped] is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it."

Appellants point out that their estoppel claim should not be controlled by the *Utah Power & Light Co.* case, *supra,* because there private companies were using public lands "without any color of title, or claim of right" except alleged unlawful and unauthorized assurances of federal agents. In that respect, Utah Power & Light Co. had considerably more to rely on, for purposes of an estoppel argument, than appellants herein. Here their actions were taken without any *affirmative* reassurances or representations by government agents.

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The same argument (laches, estoppel, adverse possession, valuable improvements) here urged by applicants against the United States was urged by the State of California against the United States in *United States* v. *California, supra.* It was ruled upon by Mr. Justice Black at page 39-40. He concluded:

> "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." 332 U.S. at 40.

We are satisfied the district court was correct in holding the doctrine of estopple inappropriate when sought to be applied against the government under the facts of this case.

Nor are we impressed by the argument that the government should be estopped in order not to seriously jeopardize the stability of land titles. Title to riparian lands has been so jeopardized since our constitution was adopted. If any change in riparian rights is to be instituted, it should be by act of Congress, representing the wish of the people, and not by the courts on behalf of individual litigants.

We turn to the Color of Title Act (43 U. S. C. §§ 1068, *et seq.*) which reads in material part:

> "The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that *a tract of public land* has been held in good faith and in

> peaceful, adverse possession by a claimant, his ancestors or grantors, under claim of color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, . . . issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre . . . and provided further, that no patent shall issue under the provisions of this chapter for any tract to which there is a conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant." (Emphasis added.)

The trial judge found that "there was no showing that during the period the State of Arizona claimed the property for taxes between 1940 and 1942 any of defendants' [appellants here] predecessors in interest or the State of Arizona were in possession of the parcel."

The present action commenced October 10, 1960, and hence appellants' adverse possession lacked one year and four months of the required twenty-year period (Tr. 401). Appellants urge that a forty-six year claim of record title constitutes the equivalent of twenty years of adverse possession—equated by appellants to "physical possession"—despite the tax-sale period.

Appellants' assertion, however, is no rebuttal to the trial judge's finding that the State of Arizona never took possession of the parcel during the period it claimed the property for taxes. Although a state or other governmental body may adversely possess real property (3 Am. Jr. 2d § 139), and though a state's possession by operation of law may be tacked to other possessory periods for purposes of satisfying the statutory period (2 C. J. S. §§ 129-30), the states' pos-

session, to be adverse, must still constitute color of title, as that term is applied to the actions of any party; it must be actual, open and notorious to satisfy the Color of Title Act. While considerable doubt exists as to whether Arizona's claim of property for taxes is one that can be characterized as under "color of title," (2 C.J.S. § 74) we need not determine that question here. In any event, even if the State's claim were considered as one under color of title, there must nevertheless be a showing that the claimant was in actual exclusive, continuous, open and notorious possession of the parcel.[2] The record before us clearly supports the trial judge's finding that Arizona's claim was *not* accompanied by *any* form of possession. The twenty-year period prescribed by the Color of Title Act was therefore not satisfied.

No cases are cited to support appellants' position. Moreover, the government supports its position not only on a failure to prove the necessary adverse possession, but on the further fact that (a) this was not land subject to public entry, for it was land accreted to withdrawn land; and (b) withdrawn land is not subject to the Color of Title Act because it is already appropriated for other purposes. *Federal Power Comm'n* v. *Oregon,* 349 U. S. 435, 446-48 (1955); *Anderson* v. *United States,* 218 F.2d 780 (9th Cir. 1955); *Jones* v. *United States,* 195 F.2d 707, 709 (9th Cir. 1952); *United States* v. *Hanson,* 167 Fed. 881, 886 (9th Cir. 1909).

Appellants have, therefore, not demonstrated a valid title to the disputed land under the Color of Title Act.

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[2]*Faulks* v. *Schrider,* 114 F.2d 587 (D.C. Cir. 1940); *Richterberg* v. *Wittich Memorial Church,* 222 F.Supp. 324 (W.D. Okla. 1963), *aff'd* 334 F.2d 869 (10th Cir. 1964), *cert. denied* 379 U.S. 1000 (1965); *Buckhannan* v. *Nash,* 216 F.Supp. 843 (E.D. Ark. 1963); *Boyle* v. *D-X Sunray Oil Co.,* 191 F.Supp. 263 (N.D. Iowa 1961); *Payne Land & Livestock Co.* v. *Archuleta,* 180 F.Supp. 651 (D.N.M. 1960).

Appendix A

Accretion Versus Avulsion

We next examine the question of whether the land involved is accreted land. It was upon that assumption that the foregoing points have been decided.

The determination of whether land is accretive depends, by Supreme Court definition, upon whether the shift of the land in question, when it has taken place, has been "gradual and imperceptible"; or "sudden and perceptible". *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 624 (1912).

Here, the United States presented detailed testimony and well-documented exhibits on the course of the river in the vicinity of the tract in question from 1902 to 1942. That evidence showed a small bend developing a short distance above the government-owned Section 4 between 1902 and 1912. The bend migrated in the classic manner, eating away soil on the concave bank and depositing soil on the convex bank. In this manner, the bend moved downstream eroding the Arizona bank and building up the California bank. Between 1922 and 1925, the bend reached the site of the land in Arizona that is now claimed by appellants. By 1925, about half of the land had washed away and by 1926 the land had been entirely taken and the bend was continuing its downstream progression. The United States land opposite this area was slowly being built up by the soils washed downstream so that between 1930 and 1936 the accretion was complete and the tract in question here was formed. Since 1936 the river has remained in relatively the same location as it flows past the tract. The district court's findings of fact are not as detailed as the foregoing summary of the United States' evidence, but the court agreed with that evidence and accepted the United States' theory of the case.[3]

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[3]See Clk's Tr. 278-81.

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Appellants claimed there was an avulsive change. The government contended that if any avulsive change had occurred, it had taken place at another location on the river. The trial court held that the weight of the evidence supported the government's position. It expressly found accretion, not avulsion, at the site of the disputed property.[4]

The erecting of artificial structures does not alter the application of the accretion doctrine (*County of St. Clair* v. *Lovingston,* 90 U. S. (23 Wall.) 46, 50-66 (1874)), unless, perhaps, structures are erected for the specific purpose of causing the accretion. Appellants claimed the Laguna Dam downstream, built by the government, increased the silt and thus caused heavier cutting power in the river upstream. The government evidence disclosed that the Laguna Dam had little, if any, effect upstream. The court found the building of the dam was an insignificant factor in the subsequent accretion.[5] We find substantial evidence to support this conclusion.

As an alternative theory of recovery, appellants raised a title claim under the doctrine of re-emergence. The doctrine rests upon "easy identification" of riparian land "lost" and "found" again by re-emergence from the stream bed. These elements are not here present.

We agree with the government:

> "That doctrine has been applied by some state courts as an exception to the doctrine of accretion, but not in a factual situation such as is present in this case.

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[4] "In my opinion, the evidence establishes that the parcel in question accreted to the land on the California side and that no boundary change took place by prescription and acquiescence." (Clk's Tr. 278.)

[5] "[T]he assumption would not support a finding that the aggradation attributed to the building of the Laguna Dam was more than a minor factor in causing the erosion and accretion at the site of the parcel. There were many other natural factors which played a part in the erosion and accretion which took place." (R. T. 406.)

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> In order for the doctrine to be applied in those states that recognize it, two things must occur: First, the water-course must move across and submerge riparian land so that land formerly non-riparian is made riparian; then the watercourse must return to or near its original bed so that the riparian land that had been submerged is uncovered, or re-emerges.
> * * *
> "The United States' land to which the tract has accreted was riparian originally and one of the reasons for the doctrine of accretion is to allow that land to remain riparian. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 624 (1912). Appellants here seek to apply the 're-emergence' doctrine to render non-riparian land that was originally riparian. This is directly contrary to the purposes of the exception.
> * * *
> "*Stone* v. *McFarlin,* 249 F.2d 54, 55-57 (C.A. 10, 1957), cert. den., 355 U. S. 955. . . . *Anderson-Tully Co.* v. *Tingle,* 166 F. 2d 224 (C. A. 5, 1948), cert. den., 335 U. S. 816, where the court stated (pp. 228-229): 'Where a river is a boundary and there is no avulsion, a land-owner can never cross the river to claim an accretion on the other side.'" (Appellee's Brief, pp. 15-17.)

An examination of the record indicates that not one of the district court's findings is totally unsupported by the evidence. Where the evidence is contradictory, yet a finding is made by the trier of fact which is reasonably supported by substantial evidence and is not clearly erroneous, that finding must be upheld; we have no power to change it.

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Appellants suggest in their reply brief that while the government's position has "superficial appeal," it is fallacious because of the premise that the land was owned by the United States "as if never sold away by patent or as if subsequently repurchased under deed." The answer is that the accreted land on the south bank never was sold away by patent, and never was repurchased. Appellants equate the precise land lost by erosion from the land on the Arizona side of the river with the precise land gained by accretion on the California side. There is no "physical identity" between the two areas of land, even though each is described as within the same Section 4, of Township 9 South, Range 22 East, San Bernardino Meridian. Accreted land comes from anywhere in the river above the accretion, grain by grain, and so gradually that tracing its source is theoretically impossible. If directly traceable, it more usually is evident that what occurred was the result of an avulsion process. *Iowa* v. *Carr, supra,* is relied upon by appellants, and that is a case involving avulsion, not accretion. If here there had been a finding of avulsion, rather than accretion, the *Carr* case would have ben applicable.

Amicus Curiae were permitted to file a brief on behalf of certain title companies. It emphasizes that a decision for the government is deleterious to land titles, and that if we were to interpret the Color of Title Act to cover not only patentable land, but also withdrawn land—not open to patent—then settlers could obtain a vested right in this land and title insurance and trust companies could safely (and profitably) write title insurance. That might well be a commendable result. If Congress intended that result, it could have said so. If the Color of Title Act needs enlargement, in the public interest, such change should evolve from legislative enactment, not judicial legislation.

Finding no error, we *affirm.*

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DSTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. 11.8 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA; STATE OF CALIFORNIA, et al., and UNKNOWN OWNERS, Defendants.	**CIVIL NO. 2468-SD-K** **OPINION AND ORDER DENYING MOTION OF CERTAIN DEFENDANTS TO DISMISS FOR LACK OF JURISDICTION AND ALTERNATIVE MOTION FOR CHANGE OF VENUE**

KUNZEL, District Judge:

Plaintiff seeks to condemn a parcel of land containing 11.8 acres on the north bank of the Colorado River and allegedly in Imperial County, California.

This parcel has been located on the California, or northern, side of the Colorado River since at least 1938. From 1902 until 1925 the parcel was located on the Arizona side of the river, and in 1926 at least one-half of the parcel was still on the Arizona side.

Moving defendants contend that this court does not have jurisdiction because the parcel, in fact, is in Yuma County, Arizona, and not in Imperial County, California, for the following reasons:

1. The river, which is the boundary between California and Arizona, changed its course by avulsion on

several occasions between 1902 and 1930, so that the bounadry remained in one of the older channels, and

2. There was prescription by Arizona and acquiescence by California in that the County of Yuma collected property taxes on the land from its owners, and California did not tax the property.

Plaintiff contends that the parcel, by action of the river, accreted to federal government land located on the California side. It is further asserted that the failure of California to tax the property did not constitute acquiescence since this failure stemmed from the recognition of the fact that the property belonged to the United States.

This court has jurisdiction only if the parcel is in California. *United States* v. *11 cases, etc.*, 94 F. Supp. 925, 926 (Ore. 1950), it is stated:

> "The District Courts of the United States were not created as units of one vast continental judicial system. Each has been organized by special statute as a court of the judicial system of the state in which it exercises power. A District Court is a separate entity. No District Court has jurisdiction crossing a state boundary."

See also *Petition of Devoe Manufacturing Co.*, 108 U. S. 401 (1883).

The parties stipulated that the court could try the question of jurisdiction separately without a jury, and evidence was taken upon that issue.

The law is well established that where the main channel of a stream changes gradually by reason of erosion and

accretion, the boundary formed by the river follows the channel. However, where the course of the river changes by the sudden and violent processes of avulsion, the boundary remains where the main channel was at the time of the avulsion. The foregoing rule is set forth in *Philadelphia Co.* v. *Stimpson*, 223 U.S. 605, 624 (1912), where it is said:

> "It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased he is not accountable for the gain, and if it is diminished he has no recourse for the loss. But where a stream suddenly and perceptibly abandons its old channel, the title is not affected and the boundary remains at the former line. *Rex* v. *Yarborough*, 3 B. & C. 91; *S. C.*, 2 Bligh, N. S. 147; *Gifford* v. *Yarborough*, 5 Bing. 163; *New Orleans* v. *United States*, 10 Pet. 662, 717; *Banks* v. *Ogden*, 2 Wall. 57; *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 67, 68; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 190-193; *St. Louis* v. *Rutz*, 138 U. S. 226, 245; *Nebraska* v. *Iowa*, 143 U. S. 359; *Shively* v. *Bowlby*, 152 U. S. 1, 35; Hale, *De Jure Maris*, Ch. 1, 4, 6, Hargrave's Law Tracts; *Mulry* v. *Norton*, 100 N. Y. 424. The doctrine that the owner takes the risk of the increase or diminution of his land by the action of the water applies as well to rivers that are strong and swift, to those that overflow their banks, and whether or not dykes and other defenses are necessary to keep the water within its proper limits.

> It is when the change in the stream is sudden, or violent, and visible, that the title remains the same. It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. 'The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.' *County of St. Clair* v. *Lovingston, supra* (p. 68)." [emphasis added.]

Courts have held that because of the permanency of a stream as a fixed monument, the presumption is that where a change occurs, it is by reason of accretion and not avulsion. *Wyckoff* v. *Mayfield,* 280 Pac. 340 (Ore. 1929); *Kittredge* v. *Ritter,* 151 N. W. 1097 (Iowa 1915).

By state constitutions, congressional approval, and state statutes, the Colorado River is designated as the boundary between Arizona and California, and between Imperial County, California, and Yuma County, Arizona. While the State of California is a named defendant, it did not intervene in this motion to dismiss for lack of jurisdiction. The State of Arizona is not a party to this action.

In my opinion, the evidence establishes that the parcel in question accreted to the land on the California side and that no boundary change took place by prescription and acquiescence.

The portion of the river involved passes through a valley which, on the north side of the river is named Palo Verde Valley and on the south side, Cibola Valley. This valley is alluvial in character. Before the completion of

the Hoover Dam in 1936, the river was described as one of the greatest silt carrying streams in the world. Flowing through the valley the river was, during the period in question, typically sinuous with numerous meander loops and bends. Meandering is defined as the process of a river developing into loops and bends, and the mechanics of meandering is accomplished by the river cutting or eroding on the concave side and depositing on the convex side. Before the completion of Hoover Dem the flow varied greatly between flood periods usually in June or July and low water periods in the winter. Despite this, there are very few documented avulsions.

Three very well-qualified experts testified for plaintiff and defendants; Mr. Carl P. Vetter and Mr. Perley M. Lewis for defendants, and Mr. J. S. McEwan for plaintiff. Numerous exhibits were introduced in the form of historical maps and reports which were relied upon by the experts to sustain their various opinions. Defendants contend that since 1902 there were three periods in which an avulsion occurred affecting the parcel in question, namely, 1912 to 1914; 1918 to 1921; and 1927 to 1930. These periods will be discussed in order.

Mr. Vetter testified that between 1902 and 1909 the river in the area involved was very stable and that there were only minor changes until the closure of Laguna Dam in 1909. This dam is located about 45 miles downstream from the parcel. It was his opinion that the dam caused excessive aggradation up the river beyond the area involved, and that as a result of this excessive aggradation, the river overflowed its banks in flood periods between 1912 and 1914 and did not return to its old 1902 channel. This opinion is premised upon the J. H. Levering Map of 1910 (Ex. M),

the Charles J. Berg Map of 1912 (Ex. O), and the C. K. Clarke Map of 1914 (Ex. R). These maps portray that between 1912 and 1914 the river formed a bend downstream from the parcel and northwest thereof. The apex of this bend was approximately 7,000 feet northwest of the parcel and about 5,000 feet north of the 1902 channel.

The Clarke Map of 1914 shows that a channel remained in approximately the same location as the 1902 channel. This channel was designated as a "shoot channel" by Mr. McEwan, and was characterized by him as the low water channel. The bend north of the "shoot channel" was said by McEwan to be a sweep of the river caused by high waters. As shown by later maps, the Caldwell-Richards Map of 1927 (Ex. 20), this channel in the location of the bend gradually moved south and back towards the old channel. Thus, it cannot be said that the sweep which caused this bend had the effect of making the 1902 channel a permanent boundary free of further changes by accretion and erosion while water still flowed in it. *Arkansas* v. *Tennessee,* 246 U. S. 158, 175 (1918). Water continued to flow in the old channel and changes after 1914 affecting the parcel were by erosion and accretion. This is graphically illustrated by Exhibits 2 to 13, inclusive, prepared by Mr. McEwan.

Mr. Lewis testified that immediately north of the parcel the river avulsively abandoned its 1918 channel in 1921. This opinion is premised upon the Joint Levee District Map of 1918 (Ex. T), the Joint Levee District Map of 1921 (Ex. V), and a reconstructed map prepared by the witness indicating the 1921 channel (Ex. W). I do not believe that the exhibits relied upon demonstrate that in the immediate vicinity of the parcel the river suddenly moved from its 1918 channel to a new 1921 channel. Mr. McEwan's opinion,

based upon the Cronholm Map (Ex. 6-A), is more logical. He felt that during this period the river was behaving normally by eroding the concave bank of the bend that had been forming upstream from the parcel for some period of time.

Defendants more seriously urge that the change which occurred between 1927 and 1930 was caused by avulsion. Mr. Lewis testified that in the early part of 1927 the Palo Verde Irrigation District constructed a jetty across the river about three-fourths of a mile downstream from the parcel, and when the 1927 flood hit the jetty "it [the river] suddenly jumped from the north side of the subject 11.8 acres to the south side." In support, defendants rely on a reconstructed map prepared by Mr. Lewis (Ex. AI). There were also introduced a 1930 aerial photograph (Ex. AR), and enlarged sections of the aerial photograph (Ex. 10-A and 26). There is a sharp difference of opinion between Mr. Lewis and Mr. McEwan as to the interpretation of the aerial photographs. Mr. Lewis stated that Exhibit AR showed that the parcel in question, after it arrived on the California side, had vegetation growing on it and it could not, therefore, have arrived by accretion. Mr. McEwan illustrated on Exhibit 26 that the parcel was a sand bar and it had, therefore, arrived there by accretion. Plaintiff called Mr. Spencer Webb who was a project engineer for the Palo Verde Irrigation District from about June 1925 until November 1927, and supervised the construction of the jetty referred to by Mr. Lewis. He was the only eyewitness called by either side. In 1927, Mr. Webb published a report about the building of the jetty (Ex. 19). He testified positively that while the jetty succeeded in its purpose of turning the river downstream from the jetty, it had no effect on the channel upstream. This conclusion is borne out by Exhibit 20 which is a map prepared at the time and appears in the article as "fig. 12."

Appendix B

In support of defendants' contentions that the State of Arizona annexed the land through prescription, there were introduced in evidence several patents and deeds to the parcel, all of which were recorded in the Office of the County Recorder of Yuma County, Yuma, Arizona. Also introduced were tax deeds dated October 25, 1940 and March 20, 1942, from the Treasurer of Yuma County, Arizona, and from the Board of Supervisors of Yuma County, respectively, to the defendants' predecessors in interest. It appears from the evidence that since 1914 the land has been assessed by Yuma County and taxes collected from the owners, with the exception of the time that Yuma County owned the property. Defendants also filed affidavits of certains officials of Yuma County who stated that they claimed jurisdiction over the property. In opposition, plaintiff introduced records of assessment by the Assessor of Imperial County for taxes on property in the immediate vicinity of the parcel. There were also introduced descriptions of claimed boundaries by certain California school districts which delineated the boundary in the area in question as the center line of the channel of the Colorado River, the last description being dated July 1, 1958. It is interesting to note that on Exhibit 32-M which is the boundary description of the New Unified School District composed of the Bard and San Pasqual Union School District, there appears the following notation:

> "Boundary parallel to the Colorado River Should be Changed at time the State Line Between California and Arizona is established by law."

No evidence was introduced indicating there was any knowledge on the part of any California official that Arizona

had ever taxed the property in question or that it claimed jurisdiction over the parcel. No evidence was introduced that the occupants of the property voted in Arizona or that any of the occupants ever attended school in Arizona. It was stipulated that by statute, both Arizona and California have authorized the creation of boundary commissions to consider boundary changes due to changes in the course of the river. Since their creation in 1953, the commissions have met separately and jointly in an attempt to settle the boundary dispute. Although a joint report has been made, it was not offered in evidence and no action on the report has been taken by either California or Arizona. Plaintiff contends that the State of California had no right nor reason to tax the property in question because it had accreted to land which has been owned by the federal government since 1902.

In *Arkansas* v. *Tennessee,* 310 U. S. 563 (1940), the court held that there had been prescription by Tennessee and acquiescence by Arkansas. In that case it had been shown that Tennessee had taxed the land in question for over 100 years and that the inhabitants of the land in question voted in Tennessee, were married by Justices of the Peace of Tennessee, and did road work for Tennessee. On the other hand, Arkansas had never asserted any jurisdiction. In *Michigan* v. *Wisconsin,* 270 U. S. 295 (1926), the Court held that there was prescription by Wisconsin, basing this conclusion on the fact that Wisconsin had taxed the property involved for over 75 years and that on it towns were built, highways constructed, public buildings erected, elections held, and Wisconsin law enforced.

I do not feel that the tests laid down in *Arkansas* v. *Tennessee* and *Michigan* v. *Wisconsin, supra,* have been met in this case. The facts in this case fall more closely

within the category of *Louisiana* v. *Mississippi*, 282 U. S. 458 (1931) and *United States* v. *450 Acres of Land, etc.*, 220 F. 2d 353 (5th Cir. 1955), *cert. den.*, 350 U. S. 826.

In accordance with the foregoing, defendants' motion to dismiss for lack of jurisdiction of this court is denied. Defendants' alternative motion for change of venue is also denied.

Dated: This 16th day
of May, 1962.

FRED KUNZEL
United States District Judge

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. 11.8 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA, et al., Defendants.	CIVIL NO. 2468-SD-K MEMORANDUM OF DECISION RE TITLE AND DEFENDANTS' RIGHTS TO COMPENSATION

On May 16, 1962, an opinion and order were filed in this condemnation action denying defendants' motion to dismiss for lack of jurisdiction. Jurisdiction had been attacked on the theory that the land in question, although it was on the California side of the Colorado River, arrived there by reason of an avulsion and, therefore, the boundary between Arizona and California was not altered. Since the opinion, California and Arizona have ratified the action of the Interstate Boundary Commission fixing the boundary at the point in question as the center line of the present river channel, §§ 176, 176, California Government Code. This compact is now subject to Congressional approval.

Thereafter, plaintiff filed a motion for an order determining title to be in the plaintiff, and for an order determining defendants have no right to compensation. This

issue was, by stipulation, tried by the court without a jury. The claim of the Government is that the parcel in question accreted to Government land, and therefore title is in the Government. Defendants contend that the parcel in question accreted to land northeast of Government land. If the original opinion on jurisdiction is correct to the effect that the accretion was to the north side of the river, there is no question that the land accreted to other Government land. This is illustrated by Exhibits 37, and 39 through 51. Thus, the owner of land to which there is accretion acquires the title to the accreted land while the former owner cannot follow the land across the river. *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 624 (1912); *Nebraska* v. *Iowa,* 143 U. S. 359 (1892); *Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178, 189 (1890).

Defendants have raised additional defenses which have received careful consideration. They are:

1. Defendants hold a vested interest under the "Color of Title Act." which this court can and should recognize.
2. Congress has relinquished plaintiff's claim to the land by enacting the "Submerged Land Act."
3. The doctrine of reemergence should be applied.
4. Plaintiff cannot claim the parcel by accretion in that it artificially induced the accretion process.
5. Plaintiff is estopped to assert its claim against defendants as bona fide purchasers.

Before taking up contentions, the factual situation relative to the parcel will be briefly reviewed.

Appendix C

In 1914 the Government issued a patent to certain land which contained the parcel in question, to one Cherry S. E. Carlin. A portion of this land which included the parcel was taken by the State of Arizona in 1940 for delinquent taxes. The State of Arizona, on February 18, 1942, sold the property containing the parcel in question to predecessors in interest of the defendants. In February of 1955 certain of the defendants as lessors, entered into a lease agreement with certain defendants as lessees, covering in part the parcel in question. All of leased land is on the California side of the river and contiguous. The lease agreement provided that at the expiration of the term of the lease, lessees should have the option of purchasing the land at $54 per acre. The majority of the land leased was described as land situated in the County of Imperial, State of California, and it is stated in the lease regarding the California land:

> "It is expressly understood and agreed that lessors do not have title to the aforesaid property, i.e., lessors have but a possessory right. Should lessees be dispossessed by reason of the Government having a superior interest, lessor shall have no liability. . . ."

As to the land containing the parcel in question, the lease agreement states:

> "As to the 15 acre parcel iin Arizona, lessors warrant that they have title in fee to the same."

The fifteen acres described as being in Arizona which contained the parcel in question, was conveyed by the lessors upon exercising the option in the lease to the defendants R. A. Beaver and J. R. Beaver, by grant deed dated February 10, 1959. This deed was recorded in Arizona

on February 20, 1959 (Ex. H). The defendant J. F. Beaver testified that in addition to the purchase price of $54 per acre, the defendants spent approximately $250 per acre for leveling the land prior to any notice of the claim by the Government. The defendant Beaver further testified that prior to the time that he purchased the land he had heard a rumor that the United States had purchased certain property adjoining the leased property. (See Exhibit BK).

Defendants' contentions will be treated in the order stated above:

1. Defendants hold a vested interest under the "Color of Title Act" (43 U. S. C. A. § 1068 et seq.) which this court can and should recognize.

Defendants' contention in this respect cannot be sustained. Assuming this court has jurisdiction to determine the question, the defendants or their predecessors have not maintained uninterrupted possession for the necessary twenty years in order to qualify under the Act. The time must be held to commence from the date of the Arizona tax deed to defendants' predecessors which was dated February 18, 1942, rather than from 1914, the date of the Government patent to Carlin, for the reason that a sale for taxes to a governmental agency interrupts the statutory period. 3 Am. Jur. 2d, *Adverse Possession* § 75. Here there was no showing that during the period the State of Arizona claimed the property for taxes between 1940 and 1942, that any of defendants' predecessors in interest or the State of Arizona were in possession of the parcel. Defendants contend that although it be true that the twenty-year period did not commence until February 18, 1942, the twenty-year period elapsed for the reason that the Govern-

ment was not granted possession in this action until June 14, 1962. However, it is uniformly held that an action to obtain possession by the true owner interrupts the statutory period and that possession obtained through such action by the true owner relates back to the date of the bringing of the action. 3 Am. Jur. 2d, *Adverse Possession* § 91; *Weber* v. *Commissioners,* 18 Wall 57, 21 L.Ed. 798 (1873). The complaint in the instant action contains allegations that the Government claimed title to the land involved and that it was only seeking to condemn the adverse interest of the defendants. Furthermore, a declaration of taking was filed together with a nominal deposit on the same day that the action was commenced on October 10, 1960, pursuant to the Declaration of Taking Act, § 258, Title 49 U. S. C. A. This Act provides that where a declaration of taking is filed pursuant to the Act, title to the property vests in the United States as of the date of the filing of declaration. See *United States* v. *Dow,* 357 U. S. 17 (1958).

2. Congress has relinquished plaintiff's claim to the land by enacting the "Submerged Land Act," 43 U. S. C. A. § 1301, et seq.

This Act does not apply by reason of the exception contained in § 1313 of the Act which exempts lands and accretion thereto "lawfully held" by the United States. Inasmuch as there has been here a holding that the parcel accreted to the Government's land, the parcel becomes Government land lawfully held by the United States.

3. The doctrine of reemergence should be applied.

This doctrine, defendants assert, is a limitation on the doctrine of accretion. From a reading of the cases cited, it

appears that the doctrine of reemergence applies only where the submerged land is restored after being temporarily submerged. If applied in a case such as this it would deprive a riparian owner of his right to remain riparian when accretion occurs.

4. Plaintiff cannot claim the parcel by accretion in that it artificially induced the accretion process.

The evidence supports a finding that there was a casual connection between the construction of Laguna Dam in 1909 by the Government and the changes which took place on the river near the site of the parcel in subsequent years. Both of defendants' experts so testified, and while plaintiff's expert denied that there was a casual connection, a report which he wrote in 1959 supports defendants' experts in this respect, Exhibit BF, p. 19. However, the evidence would not support a finding that the aggradation attributed to the building of Laguna Dam was more than a minor factor in causing the erosion and accretion at the site of the parcel. There were many other natural factors which played a part in the erosion and accretion which took place. There is no question that a general rule has been expressed to the effect that where a riparian owner causes by himself through an artificial condition, accretion, he cannot claim title to land added thereby. 134 A. L. R. 367, 472. However, analysis of the cases indicates that to support the rule contended for by defendants, the artificial structure would have to have been a major factor in causing the accretion, or the artificial means would have to be constructed for the purpose of causing the accretion. In the instant case, Laguna Dam was constructed by the Government for irrigation purposes. It was a low-rise dam and located some 45 miles

downstream from the parcel. There is no contention that the dam was constructed for the purpose of causing the accretion. In fact, the dam was not built for the purpose of benefiting any governmental agency, but was built for the benefit of farmers in the basin.

5. Plaintiff is estopped to assert its claim against defendants as bona fide purchasers.

Despite the general principle that "there can be no estoppel against the Government or its agencies," defendants urge that by reason of the inaction of the Government in asserting its claim to the property in question, an equitable estoppel can be spelled out. While there have been certain exceptions to the general rule as above stated, no cases where federal law has been applied, are found where inaction has been held to be the basis. In fact, our Circuit has held that inaction on the part of Government agents in standing by where improvements are made on Government land, cannot estop the Government from asserting its title. *Jones* v. *United States,* 195 F. 2d 707, 709 (9th Cir. 1952). See also *Utah Power & Light Co.* v. *United States,* 243 U. S. 389 (1917).

The evidence here shows that the defendants Beaver and their predecessors were bona fide purchasers of the property in question, with no knowledge of the Government's claim. Also, since about 1955, the Government agents in the reclamation service probably observed this riparian land being put to agricultural use.

The above conclusions have been very reluctantly reached as there are many equities in defendants' favor. It would have been to the credit of the Government to have attempted to reach an equitable settlement with defendants.

However, the Government having failed to do so, defendants' redress is not in the courts but with Congress.

This memorandum, together with the previous memorandum of May 16, 1962, shall constitute the findings of fact and conclusions of law regarding title and defendants' right to compensation. Plaintiff shall serve and file a final decree in accordance herewith.

FRED KUNZEL
United States District Judge

DATED: December 31, 1963

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* 11.8 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA, et al., *Defendants.*	No. 2468.-SD-K Civil FINAL DECREE IN CONDEMNATION

This cause came on regularly for hearing before this Court by stipulation, the matter being tried without a jury. The Court finds that the following named defendants were duly and regularly served in this proceeding and that all stages thereof were given due, proper and regular notice: R. A. BEAVER and MARILYN BEAVER, his wife; J. F. BEAVER and PATRICIA BEAVER, his wife; FAY E. OLSSON; R. A. BEAVER, J. F. BEAVER and FAY E. OLSSON, individually, and as co-partners doing business as Beaver Bros.; BEAVER BROS., a co-partnership; WILLIAM Y. MURPHY, also known as W. Y. Murphey, and THELMA MURPHEY, his wife; JOE D. MCCAIN and JUANICE MCCAIN, his wife; EMMA CREWS, as Executrix of the Estate of Linton A. Crews, also known as L. A. Crews, Deceased, and EMMA CREWS, individually and as co-partners doing business as Desert Ginning Company and/or Desert Land

Company: DESERT GINNING COMPANY, a co-partnership; DESERT LAND COMPANY, a co-partnership; KINDRED E. HARVEY; IVA MAE HARVEY; COUNTY OF IMPERIAL; STATE OF CALIFORNIA; EARL HARVEY; T. R. SHOEMAKER and MARYLYN SHOEMAKER, his wife; UNITED FARMS, INCORPORATED, an Arizona corporation; W. J. MILNER and MARJORIE MILNER, his wife; CITIZENS NATIONAL TRUST & SAVINGS BANK OF RIVERSIDE, CALIFORNIA; FAYETTE F. KUNZ and MELBA KUNZ, his wife; PAUL E. RICHARDSON and NORMA RICHARDSON, his wife; TRI-STATE FARMS & RANCHES, INC., an Arizona corporation.

The memorandum of the Court, filed herein on May 16, 1962, and the memorandum of the Court, filed herein on December 31, 1963, shall be and constitute the Court's FINDINGS OF FACT AND CONCLUSIONS OF LAW in this proceeding, and the aforesaid memoranda, and each of them, be, and hereby are, incorporated herein by reference as though fully set forth herein at length.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That on October 10, 1960, plaintiff filed herein its Complaint in Condemnation and its Declaration of Taking, which included the real property therein described, which pleadings are incorporated herein by reference as though fully set forth herein at length;

2. That on October 10, 1960, plaintiff deposited into the Registry of this Court the sum of $1.00 as estimated just compensation for the adverse interests, if any, of the defendants, and each of them, and that thereupon title to said property as described in said Declaration of Taking became vested in plaintiff, United States of America;

3. That plaintiff had, and has, the right to condemn the property, estates and interests described in its Complaint in Condemnation and in its Declaration of Taking on file herein for the public uses described and set forth therein;

4. That plaintiff, United States of America, at all times pertinent, possessed, and still possesses, the full fee simple title to said real property, and that the following named defendants, and each of them, jointly and severally, at no time whatsoever possessed or do presently possess, any lawful right, title or interest in and to said lands, and have no right or claim to compensation in this proceeding:

R. A. BEAVER and MARILYN BEAVER, his wife; J, F. BEAVER and PATRICIA BEAVER, his wife; FAY E. OLSSON; R. A. BEAVER, J. F. BEAVER and FAY E. OLSSON, individually, and as co-partners doing business as Beaver Bros.; BEAVER BROS., a co-partnership; WILLIAM Y. MURPHEY, also known as W. Y. Murphey, and THELMA MURPHEY, his wife; JOE D. MCCAIN and JUANICE MCCAIN, his wife; EMMA CREWS, as Executrix of the Estate of Linton A. Crews, also known as L. A. Crews, Deceased, and EMMA CREWS, individually and as co-partners doing busines as Desert Ginning Company and/or Desert Land Company; DESERT GINNING COMPANY, a co-partnership; DESERT LAND COMPANY, a co-partnership; KINDRED E. HARVEY; IVA MAE HARVEY; COUNTY OF IMPERIAL; STATE OF CALIFORNIA; EARL HARVEY; T R. SHOEMAKER and MARILYN SHOEMAKER, his wife; UNITED FARMS, INCORPORATED, an Arizona corporation; W. J. MILNER and MARJORIE MILNER, his wife; CITIZENS NATIONAL TRUST & SAVINGS BANK OF RIVERSIDE, CALIFORNIA; FAYETTE F. KUNZ and MELBA KUNZ, his wife; PAUL E. RICHARDSON and NORMA

Appendix D

RICHARDSON, his wife; TRI-STATE FARMS & RANCHES, INC., an Arizona corporation;

5. That the sum of $1.00 heretofore deposited into the Registry of this Court should, and shall be, returned to the Treasurer of the United States for the account of excess funds deposited in condemnation cases, and the Clerk of the Court is authorized and instructed forthwith to draw a check on the registry funds in the amount of $1.00 payable to the Treasurer of the United States, and to deliver the same to a representative of the Office of the United States Attorney, Southern District of California, for transmittal, through the proper channels, to the said Treasurer of the United States;

6. That the Court retains jurisdiction hereof to make and enter such further orders and decrees in the premises as may be necessary.

DATED: This 6th day of February, 1964.

FRED KUNZEL
United States District Judge

Presented by:

FRANCIS C. WHELAN
United States Attorney
JAMES S. OKAZAKI
Assistant United States Attorney

By JAMES S. OKAZAKI
Attorneys for Plaintiff

APPENDIX E

Constitution of the United States, Article Four, Section Three, Clause Two:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Constitution of the United States, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases rising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

43 U. S. C. Section 1068 (Color of Title Act):

The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, or (b) may, in his discretion, whenever it shall be shown to his satis-

faction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application during which time they have paid taxes levied on the land by State and local governmental units, issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre: *Provided,* That where the area so held is in excess of of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres, may be patented hereunder: *Provided further,* That coal and all other minerals contained therein are hereby reserved to the United States; that said coal and other minerals shall be subject to sale or disposal by the United States under applicable leasing and mineral land laws, and permittees, lessees, or grantees of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining such deposits: *And provided further,* That no patent shall issue under the provisions of this chapter for any tract to which there is a conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant.

43 U. S. C. Section 416 (Reclamation Act of 1902):

The Secretary of the Interior shall, before giving the public notice provided for in section 419 of this title, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434,

439, 461, 491 and 498 of this title, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of such sections; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided,* That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of such sections; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 936

R. A. BEAVER, ET AL,
Petitioners,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF ARIZONA, URGING THAT THE WRIT OF CERTIORARI ISSUE.

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INTEREST OF AMICUS

The State of Arizona is interested in this action because it owns land in the lower Colorado River area which was adversely affected by the decision below.

The State of Arizona is the record title holder of approximately 22,500 acres of land located on both sides of and within five miles of the Colorado River. This

land was ceded to the State of Arizona under the Enabling Act[1] at the time of statehood. Relying on the decision below, the United States has laid claim to some of these ceded lands. Moreover, because of the impossibility of ascertaining and assessing with any degree of accuracy the facts concerning the River's location in the period from 1912 to 1935, an irremediable cloud has been cast on the State's title to much of its land.

The State of Arizona is a party in interest with respect to claims which the United States is presently asserting against private landowners. For example, immediately after the announcement of the decision below, the United States filed an action in the United States District Court for the Southern District of California (Action No. 3370-SD-K Civil) against certain individuals seeking to eject them from and to recover damages against them for allegedly trespassing upon land which they purchased from the State of Arizona. Although the State of Arizona is not named as a defendant in said action and its interest is not disclosed on the face of the complaint, the State of Arizona has owned the land involved in fee simple since statehood, subject only to the certificates of purchase issued February 21, 1962 to some of the named defendants. The State has leased the land for grazing or agricultural purposes continually, commencing in 1912 to the date the certificates of purchase were issued. Pursuant to its certificates of purchase, the State still retains an interest in the land until the stipulated purchase prices are paid, and even thereafter, the State will retain a

[1] 36 U. S. Stat. 557, 568-579.

fractional interest in the mineral rights pertaining to the land.

The State also has an interest in maintaining its jurisdictional rights and powers with respect to that privately owned land which heretofore has always been considered to be within the State of Arizona.

REASONS FOR GRANTING THE WRIT

ARGUMENT

Seldom, if ever, has a more appealing case than this been presented to any court for application of the doctrine of equitable estoppel or a like rule of equity. It is obvious even to the casual observer that the decision of the court below perpetrates a great injustice upon these appellants. This was pointed out in the brief of amicus curiae below, which was presented by seven title companies in California, Arizona and Nevada.

Beyond the inequity perpetrated upon the petitioners in this case is the hidden application of the decision below upon the property, affairs and lives of other innocent parties who own land similarly situated along the banks of the Colorado River.

The Colorado River, up to its control in 1935, was a very erratic river. It carried large quantities of silt and annually flooded wide areas, sometimes shifting its course for considerable distances in short periods of time. Consequently, there is today a considerable quantity of land on each side of the present flow channel of the river which at some time in the past was

riparian to the River, although ascertainment of the River's banks at any given time is very difficult, if not impossible. If there were not any surcease or repose from claims to lands along the River there might well be hundreds of separate accretion claims in the area by strangers to the title and occupancy of the land involved.

There are at least three special reasons why litigation with respect to such claims should be abated. *First,* what is known about the actions of the River in its uncontrolled state confirms the most relevant fact of all in that regard: that what happened in any given instance at or during any given time is quite unknowable. At best, there is great difficulty inherent in adjudging the validity of any accretion claim. Accretion claims which could be asserted today along the Colorado River are so far removed from the actual facts causing the changes in the course of the River that discovery of relevant evidence, including eye witness testimony, is virtually impossible. Meaningful and equitable factual judgments can never be rendered in these cases. *Second,* as a result, the decisions in given cases, particularly in view of the presumption of accretion which frequently has been invoked, is more likely than in most litigation to be based on speculative interpretations of inadequate data, argumentative rather than factual presentations, with inevitable injustices, follies and consequential disrespect for the law. See *Gubzer* v. *Town,* 202 Ore. 55, 273 P. 2d 430 (1954). *Third,* the enormous expense of this kind of litigation would be ruinous for many individuals and extremely burdensome even for state agencies.

The essence of those three special considerations was authoritatively stated by the Arizona State Land Commissioner, Obed M. Lassen, in a letter to the Secretary of the Interior, dated December 14, 1962, reprinted in *Report of (Arizona) Attorney General to State of Arizona, 26th Legislature, First Regular Session on Investigation of Land Rights of the State of Arizona Along the Colorado River,* p. 6 (Jan. 4, 1963) as follows.

> "We are very reluctant to proceed with the litigation to settle the ownership of these lands because we feel that such litigation would have to be carried forward in *many separate lawsuits* and would take decades to resolve. Moreover, the settlement of such lawsuits might well result in *gross inequities* because the decisions would of necessity be made within the framework of legal restrictions and based upon indeterminate facts presented with varying degrees of persuasion by various technical witnesses to various courts. Our investigations have demonstrated to us that the fact situations in the various areas to which the Government lays claim are not identical, and that each area would have to be the subject of separate consideration and litigation. We recognize that *this would cost large sums of money for both litigants and we are extremely reluctant to impose this burden upon the taxpayers of Arizona, if there is any alternative.*
>
> "One situation is, we believe, applicable to most, if not all areas in controversy and *that is the impossibility of accurately establishing the facts."* (Emphasis supplied).

There are special reasons why the claims of the United States in particular should not be permitted to be exhumed.

First, the United States has the special responsibility of preparing and issuing maps of the area and has regularly done so. Thus, in the instant case, a map prepared by the Fish and Wild Life Service, Bureau of Sports Fisheries and Wild Life in the United States Department of the Interior in January, 1958, entitled "Cibola-Palo Verde Valley, Arizona-California, Land Ownership Status", showed the land here involved as privately owned. Record title was in the petitioner and all persons concerned had acknowledged this title from the first issuance of patent by the United States in 1914. Interested persons have been entitled to rely on what were, in effect, affirmative representations by the responsible agency of the government (the same agency directly involved in this litigation) to the effect that if any claim by the United States existed, it was not to be acknowledged.

Second, The United States is in the unique position of having in its possession files of maps which have been closed to non-federal employees in controversial cases, and a team of ready-made expert witnesses to render interpretative testimony. The United States has the statutory authority, the ability and means to make self-serving "re-surveys" whenever it suits the purpose of the United States.

Third, the United States is in the unique position of being immune from the effect of the law of adverse possession and, in addition, immune from suit. Thus, unless there is some equitable estoppel of the United States, those who own land in the River area must forever remain subject to the risk of harassment and severe economic loss by the assertion of stale claims at

times most convenient to the United States as a land proprietor-litigant.

In the circumstances described, the Court should be the more reluctant to create any wall of immunity for the federal government from the ordinary principles of equity applicable to all other litigants alike. An examination of the authorities relied upon in the opinions below compared with the many cases where equitable estoppel was applied to bar inequitable claims by the United States, is convincing that neither precedent nor reason requires or would justify any such immunity. In particular, the cases cited in petitioners' briefs below and in the petition filed with this Court make it abundantly clear that Article IV, Section 3, clause 4 of the Constitution, granting to Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," whatever its implications for the allocation of power between the Congress and the President, cannot be read to deprive the courts of the United States of their responsibility to exercise "The Judicial Power" in "Controversies to which the United States shall be a Party" [U.S. Constitution, Art. III, Sec. 2]. Indeed, were Article IV to be so read, it is not too much to say that, in a case like the present one, a conflict would be created with the specific prohibition of the Fifth Amendment against the taking of private property without just compensation. Where the United States is already favored with every advantage, including the advantage of immunity from suit to clarify record titles, it is too much to hold also that it may, with Congressional authority, publish maps and reports, inviting reliance thereon and then,

lying in wait, spring upon those who do rely thereon to seize from them what in good conscience is theirs—and, to add insult to injury, to collect damages for their good faith use of the property which all previously acknowledged was theirs. Nothing in the Constitution, nothing in law any more than in equity, requires, let alone justifies, such a result.

Indeed, it would seem that, apart from the traditional power of equity to refuse to do inequity, the Congress has provided a specific remedy in the Color of Title Act of 1928, as amended[2] which both bolsters petitioners' plea as to equitable estoppel and provides in itself a means of according recognition to petitioners' ownership of the land involved and their Fifth Amendment rights. Plainly, the Color of Title Act aims to correct inequities resulting from vagaries in the administration of the public land laws which occasionally were frustrated by administrative mistakes or confusions and to serve as a statute of repose against the United States—consistent with the design of the public land laws to encourage agricultural settlement.[3]

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[2] 45 Stat. 1069, as 67 Stat. 227 (1953), 43 USC Sec. 1068 (1964)

[3] The history of the public land laws in that regard has been traced by one writer as follows:

"Our earliest public land policy, beginning with the Northwest Ordinance of 1785, had as a major objective sale of public lands for revenue. It was when that policy, which in effect encouraged the speculative purchase and sale of public lands, failed to accomplish the effective utilization of our land as an instrument of natural growth that our laws were redesigned to encourage individual settlement of public lands. (See Clawson, "Uncle Sam's Acres," p. 45 (1951). Among the laws then passed were a series of 'preemption acts' primarily designed to accord protection to those settlers who had advanced beyond the surveyed frontier to 'squat' upon unsurveyed land not yet offered for sale, culminating in the Pre-emption Act of 1841, which provided to any squatter the prior right to purchase, at $1.25 per acre up to 160 acres of public land occupied by him. (See Wright, "Economic History of the United States" (1941).) 'The preemption law,' said Senator Scott of Indiana, was 'merely declaratory of the custom or common law of the settlers.'

The interpretation of the Act by the court below, if allowed to stand, would defeat both of those objectives. Indeed, the decision below is so extreme as to render the Act virtually useless and of no avail in a wide area of the Southwestern United States.

"Still, the insistent demands of the West (with increasing political force), the pressure of surplus labor in the cities, and the reforming idealism of easterners like George Evans and Horace Greeley combined to press for free land. (See Riegel, "America Moves West," p. 426 (3d ed. 1956); Turner, "The Significance of the Frontier in American History," p. 30 (1893).) In response, at last, Congress enacted, and in 1862 the greatest of frontiersmen, President Lincoln, signed the justly famous Homestead Act. Under that law, still a basic provision of our public land statutes, a settler could obtain patent to 160 acres of Federal land without cost upon proof (essentially) that he had resided upon or cultivated the land for 5 years." "The moving spirit of the Homestead Act is well reflected in the remarks of Senator Samuel Pomeroy speaking on its behalf in May 1862: 'Now, then, to increase the revenue of the country, add to the number of self-sustaining families of the Nation, to secure the development, growth, and happiness of a people, put a household on every quarter section.' The objective of the act, it will be seen, was, as stated by the Supreme Court of the United States, 'to secure, so far as possible, a bona fide settler on public lands, to promote the peopling and cultivation of those lands.'

"In the years which followed, despite the rigid settlement of the rich heartland of the country, Congress, far from reversing the land disposal policy of the Homestead Act, sought to expand it by enacting more liberal provisions with respect to the remaining public lands susceptible of agricultural development. Particularly important to the Southwest was the Desert Land Act of 1877, which allowed up to 640 acres in any of the 11 Western States and territories to any person who would enter and provide irrigation for the land; the Carey Act of 1894, which made available some 14 million acres to the States on the condition that they develop irrigation enterprises for homestead settlements; and the Reclamation Act of 1902 . . . .

"The Reclamation Act of 1902 was enacted to help overcome the formidable problems of private settlement and cultivation of the arid and semi-arid West by providing for construction by the Federal Government of irrigation works or projects upon easy, long-term repayment by the settlers.

" . . . As the biographer of the remarkable public servant who was the originator and prophet of much of our Federal land policy today, John Wesley Powell, put it, the act was written 'in the interest of the Jeffersonian yeoman and the 160-acre farmstead' (Stegner, "Beyond the Hundredth Meridian," p. 366 (1954))."

See Hearings before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 87th Cong., 1st Sess., ser. 17, at 94, 100-101 (1962).

It is unfortunately true that, as a result of the depression of the 1930's, followed by World War II, a considerable quantity of agricultural land along the Colorado River was taken over on behalf of the State because of the non-payment of taxes. The court below refused to countenance the possession by the State of Arizona of the land involved during the years 1940-1942. The court below also refused to recognize the occupancy of the land by any of its occupants after 1930 because of the general withdrawal order of the Secretary of the Interior pertaining to other land in 1929. It is deserving of note that in 1960 at least 732,000 acres in the lower Colorado River area were still held by the federal government in withdrawn status. Thus, the ruling of the court below can be utilized by the United States virtually to nullify the Color of Title Act in the lower Colorado River area.

CONCLUSION

The decision of the lower court has far-reaching effects upon the future course of development of a wide area in the Southwest.

This case presents a clear question as to the proper administration of justice by the United States relating to claims it may make to lands held by private individuals. Because of the complexity of the facts in this case and other cases which have already arisen, private litigants are forced into a position which is economically impossible to defend. There are presently pending in the federal courts within the States of Arizona and California as many as fifteen cases involving basically the same question presented in this case. Justice dictates that the petitioners as well as other landowners should not be forced to expend money in defense of these suits.

For these reasons, the Writ of Certiorari in this matter should be issued.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 936

R. A. BEAVER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is a condemnation proceeding brought to acquire petitioners' interest, if any, in certain land. The tract involved is on the site of property patented in 1914 to petitioners' predecessor in title. The patented land was located on the Arizona side of the Colorado River (Pet. App. 1a, 2a–3a). Between 1922 and 1926, the river eroded the entire tract, washing its soil downstream. While the river was thus shifting (toward Arizona), it carried soil from upstream areas and deposited it on the bank of government-owned, riparian land on the California side (opposite the destroyed patented tract). By 1936, these soil deposits had extended the government's land to the same geographic location as the original tract, the site then

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being on the California side because of the shift in the river (Pet. App. 11a). The tract of land created in this fashion was ostensibly privately owned except for a period from 1940 to 1942, when the State of Arizona levied upon it to satisfy unpaid taxes (Pet. App. 4a). Petitioners held record title to the tract at the time condemnation proceedings were instituted in 1960. The district court found that the slow shift in the Colorado River created the land in issue by the process of accretion. It held that the government is, therefore, the owner of tract, and that petitioners have no compensable interest. The court of appeals affirmed (Pet. App. 1a–14a, 25a–32a).

It is beyond cavil that a riparian owner gains title to the increase in his land formed by the "gradual and imperceptible" accretive action of the river.[1] Petitioners do not seriously challenge the factual determination that the government acquired title to the tract in this case under that canon of land law.[2] Con-

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[1] *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 624. See, *e.g.*, *New Orleans* v. *United States*, 10 Pet. 662, 717; *Banks* v. *Ogden*, 2 Wall. 57; *City of St. Louis* v. *Rutz*, 138 U.S. 226; *Nebraska* v. *Iowa*, 143 U.S. 359, 360–361; *Arkansas* v. *Tennessee*, 246 U.S. 158, 173–174; *Oklahoma* v. *Texas*, 265 U.S. 493.

[2] Petitioners suggest (Pet. 15–16) that the exceptional doctrine of re-emergence is applicable here. That claim was fully considered and properly rejected by the court below (see Pet. App. 12a). "Re-emergence" does not permit a former owner to claim land that has arisen on the opposite side of the river thus blocking another owner's riparian rights. Furthermore, the contention (Pet. 16–17) that the Government's construction of the Laguna Dam was a material cause in the erosion of the original tract or the accretion is without support in the record (see Pet. 12a); and assuming that the dam were "a minor factor in producing the accretion" it would not alter "the general rule" (*Oklahoma* v. *Texas*, 265 U.S. 493, 499).

sequently, the concurrent findings of the two courts below, which are at all events amply supported, do not warrant further review. *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214; *Rudolph* v. *United States,* 370 U.S. 269, 271. Petitioners maintain that the government is estopped from asserting its title in view of the time elapsing between the formation of the tract and the filing of this action. But the failure of its agents to enforce ownership cannot forever bar the government.[3] *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 330, 335–336; *Alabama* v. *Texas,* 347 U.S. 272; *Lee Wilson & Co.* v. *United States,* 245 U.S. 24, 31; *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 408–409; *United States* v. *California,* 332 U.S. 19, 39–40. Petitioners reply that, since they had placed improvements on the land and were in actual possession of it (Pet. 10–11), the decisions of this Court do not control. In both the *Utah Power & Light Co.* and the *California* cases, *supra,* similarly situated claimants, with more compelling reasons to rely on the government's inaction, could not prevail over the constitutional power of Congress to dispose of public property and the strong policy in favor of the public right.

[3] This is not a case where, over the course of many years, the government has not objected to the private use of public lands, thereby granting an implied license which permits continued free use "so long as the Government * * * [does] not cancel its tacit consent." *Light* v. *United States,* 220 U.S. 523, 535. See, also, *Buford* v. *Houtz,* 133 U.S. 320, 326; *United States* v. *Grimaud,* 220 U.S. 506, 521. Nor is the government here attempting to recover for petitioners' use of the land during the period of their possession.

243 U.S. at 402–403, 409; 332 U.S. at 22–23, 39. Moreover, petitioners could not have acquired ownership of the land under the Color of Title Act, 43 U.S.C. 1068 *et seq.* (Pet. App. 37a–38a) as they did not comply with the requirement of 20 years' continuous and actual adverse possession (Pet. App. 9a–10a, 28a–29a). The chain of actual possession was broken during the period in which the State of Arizona levied on the land for taxes. In addition, the government-owned land to which the tract was added by accretion had been withdrawn from entry in 1929 (Pet. App. 10a), and hence has not been subject to patent under the Color of Title Act for more than 35 years.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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